

a solely remedial purpose within the meaning of the Eighth Amendment. The Court recognized that the purpose of the Eighth Amendment is to prevent the government from abusing its power to punish. Id. at 494-95. In so concluding, the Court stated (id. at 498):

[W]e are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes to conclude that it is subject to the limitations of the Excessive Fines Clause.

145. The Commission is empowered to commence revocation proceedings against licensees under §312 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §312. And this revocation authority has consistently been labelled by the Commission and the courts as an appropriate civil "penalty" for various misconduct. See, e.g., CBS, Inc. v. FCC, 453 U.S. 367, 378 (1981) (license revocation is "penalty" under §312(a)(7) of the Act); Renewal/Revocation Approach, 93 FCC 2d 423, 432 (1983)(same); Broadcast Hoaxes, 7 FCC Rcd 4106, 4107 (1992)(admonition and license revocation or non-renewal are "penalties" for perpetration of broadcast hoaxes); Theodore E. Sousa, 92 FCC 2d 173, 179 (1982) (revocation is appropriate "penalty" under §312(a)(2) of the Act).

146. Under these circumstances, given the punitive function of the Commission's license revocation authority under §312 of the Act, the Licensees submit that the Commission's actions in this area are subject to the Excessive Fines Clause and that the Presiding Judge must apply the Austin holding to determine the constitutional propriety of license or permit revocation in this case. In this regard, revocation of any of the Licensees' licenses or permits would be wholly punitive in light of the Licensees'

demonstrated innocence regarding Mr. Rice's convictions and their record of compliance with Commission rules. Moreover, considering that the Missouri court has punished Mr. Rice by imposing a prison term of eight years, revocation of the Licensees' licenses and permits would be clearly excessive, offend the principles of the Eighth Amendment and thus, be unconstitutional.

B. The Licensees Did Not Misrepresent Facts to the Commission

147. Turning to Issue 2 ("Misrepresentation"), initially, the Licensees are obliged to address a matter raised by the Presiding Judge at the conclusion of the hearing. Specifically, in response to the Presiding Judge's directive at Tr. 638, the Licensees submit that it is well established that misrepresentation and lack of candor are separate offenses in Commission jurisprudence. See Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 ¶6 (1983); RKO General, Inc. v. FCC, 670 F.2d 215 (D.C. Cir. 1981) (Court exonerates licensee on misrepresentation charges but affirms disqualification for lack of candor). Misrepresentation involves affirmative false statements of fact, while lack of candor involves affirmative concealment of facts, with the common element between them being an intent to deceive. Id., 93 FCC 2d at 129.

148. The separateness of the two offenses is further illustrated by the fact that the customary Commission practice is to designate "lack of candor" and "misrepresentation" issues in disjunctive combination in hearing orders. See, e.g., Chameleon Radio Corp., FCC 96-353, slip op. at 12, released August 26, 1996 (emphasis added) (issue designated "To determine whether Chameleon

Radio Corporation misrepresented or lacked candor to the Commission regarding the status of its licensed broadcast facility...."). Hence, since no candor issue was designated in the Show Cause Order, the Licensees believe that the Presiding Judge is precluded from making any findings with respect to lack of candor on the part of the Licensees herein.²⁴ In any event, as will be shown, infra, there was no intent on the Licensees' part to deceive the Commission in connection with their reporting of Mr. Rice's involvement - or lack thereof -- in the Licensees' management and decisionmaking. Hence, neither misrepresentation nor lack of candor conclusions against the Licensees are appropriate in this proceeding.

149. Issue 2 inquires whether the Licensees misrepresented to the Commission that Mr. Rice "has been excluded from the management and operation" of the Licensees' radio stations (Show Cause Order, ¶20(2)). This issue was derived from the Licensees' initial 1991 §1.65 reports to the Commission that:

[s]ince Mr. Rice's hospitalization on April 3, 1991, he has had absolutely no managerial, policy, or consultative role in the affairs of the [Licensees] in which he has ownership interests and officer positions. . . . In other words, pending a resolution of the referenced criminal charges, Mr. Rice is being completely insulated and excluded from any involvement in the managerial, policy, and day-to-day decisions involving any of the four licensed stations and three construction permits held by the [Licensees].

Findings ¶34, Show Cause Order, ¶14.

²⁴ Indeed, in light of Paragraph 24 of the Show Cause Order, the Presiding Judge should not make any findings and conclusions at all concerning Issues 2 and 3 if he determines that the Licensees' licenses and construction permits should be revoked under Issue 1.

150. However, the record establishes that in subsequent §1.65 reports filed in May 1992 (shortly after Mr. Rice began to engage in occasional technical projects for the stations) and thereafter, the Licensees deleted the representation in their Commission filings that Mr. Rice would not undertake a "consultative" role. It was Mrs. Cox's decision to make this change since she had decided to utilize Mr. Rice's services at the stations on an occasional basis. Findings ¶¶40-41.

151. The record contains conflicting evidence concerning Mr. Rice's involvement in the Licensees' programming and personnel matters after April 1991. Nonetheless, the record as a whole supports the conclusions that after April 1991, Mr. Rice was not the managerial decisionmaker or policymaker that he was prior thereto, as the Licensees accurately represented to the Commission. In any case, the Bureau clearly has the burden of proving its case on this issue by a preponderance of the evidence. But, as will be demonstrated below, they have fallen short of that burden.

152. The record is uncontroverted that from April 1991, when Mr. Rice was hospitalized for psychiatric care and was excluded from the Licensees' managerial decisionmaking and consultative processes pursuant to Board resolutions, until his release some six months later, he was not involved in the Licensees' affairs or operations. Supporting this conclusion, the record reflects that in April 1991, Janet Cox assumed the functions of the Chief Executive Officer charged with managing the stations and had no contact with Mr. Rice concerning the stations. Several weeks after

Mr. Rice's October 1991 hospital release, upon his psychiatrist's advice, Mrs. Cox decided to permit him to undertake certain circumscribed technical tasks at the stations. Importantly, Mrs. Cox advised Mr. Rice that he should remain uninvolved and inactive with respect to the Licensees' management, and he agreed.²⁵
Findings ¶¶29-32, 38-40.

153. Consequently, even after his release from the hospital until he was incarcerated in September 1994, Mr. Rice was excluded from participating in the normal oversight functions of a corporate officer. For example, the record reflects that Mr. Rice, inter alia, was not involved in the hiring of a General Manager for WBOW/WZZQ (Kenneth Brown), station sales or commercial policies, accounting or billing, determinations of employee salaries, negotiation of employment contracts or a building lease for the Licensees' new corporate officers, updates in the Licensees' employee policy manual, vendor contacts with whom he previously dealt, check-writing (except on rare occasions when his signature was needed), borrowing money for the Licensees, and equipment purchases (except at Mrs. Cox's specific request). Those functions were left strictly to Mrs. Cox's domain. **Findings ¶¶47-55.**

154. While there is some evidence that Mr. Rice made unsolicited comments to Mrs. Cox, Leon Paul Hanks and John Rhea about personnel or programming matters, the weight of the evidence convincingly demonstrates that Mrs. Cox, as Vice President and

²⁵ Mrs. Cox's testimony was straightforward and matter-of-fact throughout the hearing. She appears to be a hands-on, no-nonsense executive whose motives are dictated by the Licensees' best interests.

Chief Executive Officer, made her management decisions wholly independent of what Mr. Rice may have said -- sometimes consistent with his comments, and at other times inconsistent with them. Findings ¶¶52-53. And, the testimony of Messrs. Leatherman, Brown and Hauschild supports the conclusion that they managed their respective stations without input from Mr. Rice and reported directly to Mrs. Cox.²⁶ Findings ¶¶58-68. The bottom line is that Janet Cox did what she thought was best, not what Mr. Rice may have opined or suggested. Findings ¶¶52-56.

155. In rebuttal to the direct testimony of the Licensees' witnesses, Mr. Hanks and Mr. Rhea testified that from time to time Mr. Rice discussed personnel and programming matters with them, and that Mr. Rice thereby exercised a managerial or decisionmaking role in connection with the Columbia and Terre Haute stations' operations. Presumably, the Bureau offered the testimony of Hanks and Rhea in the hope that the Presiding Judge will draw an adverse inference from their testimony that, contrary to the Licensees' §1.65 reports to the Commission, Mr. Rice did exercise day-to-day influence over the stations' affairs -- especially in personnel and programming matters. However, neither logic nor the overall record provides a sound basis for the Presiding Judge to draw that

²⁶ The record shows that Mr. Rice had no contact with either Mr. Brown or Mr. Hauschild concerning station operations. Findings ¶¶64-68. To the extent Mr. Rice had contact with Mr. Leatherman, such contacts were, with one exception, limited to matters involving Mr. Rice's interests as a landlord of the building which housed the KBMX offices and studio. The single memorandum from Mr. Rice relating to the station's sound effects was nothing more than an inquiry, not a directive, and in response thereto, Mr. Leatherman dealt with Janet Cox, not Mr. Rice. Findings ¶¶59-63.

inference, particularly in view of the questionable credibility of each of the Bureau's witnesses.²⁷

156. When judging credibility, the Presiding Judge must be especially circumspect about witness bias. In that context, the record is clear that Messrs. Hanks and Rhea were both disgruntled former employees. Indeed, Mr. Hanks, who was Station KFMZ's program director from February 1989 until he was fired in August 1994, filed a discrimination lawsuit against CMI, which is still pending. Findings ¶70. Mr. Hanks believes that his termination was "unfair" (*id.*) and admitted that he is self-centered and has "a tendency to exaggerate". Mr. Hanks now works for an in-market direct competitor of KFMZ. Findings ¶71. Moreover, Mr. Hauschild, who testified that Mr. Hanks does not take criticism well and is very "prideful", heard Mr. Hanks say in connection with the discrimination case that he wanted to "get the station, the company, Mike Rice, and everything the law is going to allow me". Findings ¶¶71-72.

157. As for Mr. Rhea, who served as General Manager of Stations WBOW and WZZQ from December 30, 1991 until he was fired by Mrs. Cox on December 16, 1992 because, among other reasons, the station was not performing up to her expectations (Findings ¶100), viewed his termination as a "career setback" and he admitted to

²⁷ When the record contains conflicting testimony, the Commission accords special deference to the Presiding Judge's credibility determinations, because the trier of fact has had a superior opportunity to evaluate the witnesses' demeanor and judge their credibility. See Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); see also FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955); Lorain Journal Co. v. FCC, 351 F.2d 824, 828 (D.C. Cir. 1965).

having animosity toward both Janet Cox and Michael Rice at the time of his termination. Indeed, since his termination from WBOW/WZZQ, Mr. Rhea has held a broadcast position -- senior sales executive -- which is clearly a step down the managerial ladder from the position he held in Terre Haute. Findings ¶75.

158. The foregoing strongly suggests that the testimony of Messrs. Rhea and Hanks about their alleged conversations with Mr. Rice was shaded by bias against the Licensees as was patent under cross examination. Consequently, their testimony further discussed below must be viewed in this context and, thus, is suspect. In sharp contrast, the Licensees' witnesses showed no such bias. Indeed, Mrs. Cox testified that she did not need her job with the Licensees to live in the style to which she is accustomed (Findings ¶31), and Mr. Leatherman is no longer employed by LBI. Findings ¶43. With respect to Mr. Hauschild, his direct case testimony went unchallenged by the Bureau. Moreover, when he testified as a surrebuttal witness concerning the departure of various employees, he testified with credible specificity in sharp contrast to Mr. Hanks' generalities. Findings ¶¶105-110. And, regarding Mr. Brown, since he also was not called for cross examination, his testimony must be fully credited.

159. Moreover, the Post hoc, ergo propter hoc ("After this, therefore, on account of it") logical fallacy that the Bureau will no doubt argue should be rejected by the Presiding Judge as a basis for attempting to show that the Licensees misrepresented the scope of Mr. Rice's activities to the Commission. Simply stated, the record evidence does not support the notion that merely because

certain events happened after Michael Rice allegedly spoke to Mr. Rhea or Mr. Hanks, they necessarily happened because of those alleged conversations. The following analysis of the testimony pertaining to Mr. Rice's alleged involvement in personnel and programming matters demonstrates this precise point.

160. Mr. Hanks testified that certain on-air KFMZ personnel were the objects of Mr. Rice's criticism (Pratt, Kinneson, Madden and Davis). However, as demonstrated below, the record is clear that whatever comments Mr. Rice allegedly made to Mr. Hanks about these employees had no impact on their fate.

161. For instance, the record shows that even if, as Mr. Hanks claims, Mr. Rice told him that Janice Pratt had a squeaky voice and, therefore, should be fired, Ms. Pratt was not fired for several months after Mr. Rice's alleged comments were made and, more importantly, Mr. Hanks fired her because of performance problems wholly unrelated to her on-air voice. Moreover, it was Mr. Hauschild who directed Mr. Hanks to have Ms. Pratt correct her performance problems or to terminate her, several months before she was eventually terminated. **Findings ¶¶103-105.**

162. Similarly, the record reflects that Robert Kinneson, who was fired by Mr. Hanks, was not necessarily fired because of Mr. Rice's alleged critical remarks made to Hanks about Kinneson's on-air performance. Rather, Mr. Hauschild testified that he, Hauschild, directed Mr. Hanks to terminate Mr. Kinneson because he was not adapting to the station's format. Moreover, Mr. Hauschild testified that his directive was not at the behest of Michael Rice,

with whom Mr. Hauschild had no conversations concerning station personnel. Findings ¶106.

163. Again, in the case of Sean Madden, even assuming, arguendo, that Mr. Rice told Mr. Hanks that he didn't like Mr. Madden's personality, the record shows that Mr. Madden was not terminated; rather, he voluntarily left for another job because he was unhappy after being moved from the morning on-air shift to the evening on-air shift. Importantly, there is absolutely no evidence indicating that Mr. Rice had any involvement in shifting Mr. Madden to the evening hours. Rather, as Mr. Hauschild testified, the shifting of Madden was based on an Arbitron study and an independent survey conducted by the station. In short, despite Mr. Hanks' testimony, there is no evidence that in any way ties Mr. Rice to Madden's departure from KFMZ. Findings ¶¶107-108.

164. Finally, with respect to Jeff Davis, the details of his mutually agreed upon departure from KFMZ (which were conveniently omitted by Mr. Hanks, but which Mr. Hauschild filled in (Findings ¶¶109-110), demonstrate that any critical remarks that Mr. Rice may have made to Mr. Hanks simply had no role in Mr. Davis' departure.

165. Next, regarding the allegations of Mr. Rhea and/or Mr. Hanks that Mr. Rice was involved in the hiring and/or firing of program directors (Hohlman, Steele, Savage, Jacobs and Ramsey) at WZZQ and WBOW (the Terre Haute stations) , again, the weight of the credible evidence is to the contrary.

166. With respect to Todd Hohlman, both Mrs. Cox and Mr. Rhea testified that he voluntarily left to take a job in a larger market. Findings ¶83. Similarly, Mrs. Cox said that she hired

Steele without Mr. Rice's direction or approval and that she ordered Mr. Rhea to fire him (or allow him to resign), based on her own view of a "Radio & Records" reporting debacle, a memo from Mr. Hanks, and conversations with Rhea. Findings ¶¶84-88.

167. As to Mark Savage, Mrs. Cox and Mr. Rhea testified that Mr. Rhea hired him (Findings ¶89) and that she fired him, based on her own evaluation of his performance and input from Rhea and Hanks and without Michael Rice directing her to do so or telling her that he wanted Savage fired. Findings ¶¶90-92. While Mr. Hanks testified that Mrs. Cox fired Savage by herself (Findings ¶93), Mr. Rhea testified that he and Mrs. Cox jointly fired Savage: "I spoke the words and she passed out the paper work". Findings ¶94.

168. With respect to Ben Jacobs, Hanks testified that he promoted Jacobs to program director (albeit with Michael Rice's concurrence), and although he claimed that Michael Rice eventually wanted Jacobs terminated, that he did not know who fired Jacobs or what the ultimate reason was for his termination. Findings ¶95. Mrs. Cox testified that WZZQ's General Manager, Kenneth Brown, fired Jacobs based on his own evaluation of Jacobs' performance (he was overwhelmed by the job), that Mr. Rice never told her that Jacobs had to go, and that, to the best of her knowledge, Mr. Rice did not direct Brown to fire him. Id. Corroborating Mrs. Cox, was Mr. Brown's uncontested direct testimony that Michael Rice has not been involved in any personnel matters at the Terre Haute stations during Mr. Brown's tenure. Findings ¶67.

169. Regarding Chip Ramsey, even assuming Michael Rice did not like Mr. Ramsey as Mr. Rhea claimed, both Rhea and Cox testified

that Ramsey was fired at Mrs. Cox's exclusive direction for reasons unrelated to Mr. Rice's alleged displeasure with Ramsey. **Findings ¶97.**²⁸

170. Concerning allegations about Mr. Rice's involvement in programming decisions, although Rhea testified that he made an inquiry about the service cost of obtaining a Satellite Music Network at the behest of Mr. Rice, he admitted that Janet Cox informed him that they would not subscribe to the program service because it was too expensive. And, Rhea could not dispute that Janet Cox made the determination not to subscribe to the program service independent of Michael Rice. **Findings ¶102.**

171. Moreover, Mr. Rhea's testimony that Mr. Rice provided music for WBOW(AM) (**Findings ¶102**) is suspect since it is not corroborated and it involved an area of station operation with which Mr. Rhea testified he was uninvolved. Significantly, Mrs. Cox unequivocally testified that Mr. Rice was not involved in programming matters. **Findings ¶51.**

172. As to the hiring and firing of General Manager John Rhea, Mrs. Cox testified that she hired him without any input from Michael Rice. **Findings ¶99.** While Mr. Hanks testified that he heard Mr. Rice speak to Mrs. Cox negatively about Mr. Rhea, and Mrs. Cox does not deny that such a conversation could have occurred, Mrs. Cox testified that she decided to fire Mr. Rhea

²⁸ The testimony of Rhea and Cox concerning the hiring and firing of Steven Holler, a one-day rookie announcer, is in conflict. See **Findings ¶98.** Thus, the Bureau has not met its burden to demonstrate by a preponderance of the evidence that Mr. Rice made the personnel decision in this instance.

because of her own view that the station had performed poorly under his leadership and because Mr. Rhea had told her several untruths. Findings ¶¶99-100.

173. In sum, the overall record shows that the Bureau has failed to meet its burden to prove by a preponderance of the evidence that the Licensees' filings with the Commission intentionally misrepresented Mr. Rice's status. In this connection, the Licensees' filings must be viewed in the proper context. Their §1.65 Statements and application exhibits, which began in May 1991, were voluntary reports concerning the pre-trial and pre-conviction stages of criminal accusations made against Mr. Rice. Such submissions to the agency were updated and modified as circumstances warranted (i.e., the emergence of Mr. Rice's limited role following his hospital release in October 1991). Findings ¶¶36, 41. There were no guidelines for the content of the Licensees' various filings concerning Mr. Rice's arrest, charges, hospitalization, and exclusion from any "managerial, policy, or consultative role" at the Licensees' stations (June 14, 1991 §1.65 Statement; Show Cause Order, ¶14).²⁹ Moreover, if the Commission had desired detailed information from the Licensees about any information contained in these filings, they could have -- but did not -- requested same from the Licensees.

²⁹ Indeed, under the Commission's current rules (October 9, 1992 partial reconsideration of CPS-2, supra, 7 FCC Rcd at 6566 ¶¶'s 9-10 (effective January 14, 1993)), a similarly-situated licensee would now not be required to make any report concerning criminal charges against a principal until his conviction became final.

174. Importantly, even if the Presiding Judge were to conclude that, notwithstanding the convincing record evidence herein, Mr. Rice's activities were not fully accurately reported to the Commission and contained "false statements", before he could legally conclude that the Licensees misrepresented facts to the Commission, he would also have to conclude that any inaccuracy was due to an intent to deceive. See Fox River Broadcasting, Inc., supra, 93 FCC 2d at 129.

175. "Intent to deceive" in misrepresentation issues implies deliberateness. See Reding Broadcasting, Inc., 69 FCC 2d 2201, 2207 (Rev. Bd. 1978). Simply put, there is no record evidence of deliberate intent to deceive herein on the part of the Licensees. Rather, the record shows that Mrs. Cox was concerned that the content of the initial reports was no longer accurate after Mr. Rice began to undertake technical/engineering tasks, and thus, she decided to modify the reports accordingly. Under these circumstances, if the Presiding Judge should find that the Licensees committed any reporting inaccuracies, he should conclude that they were "innocent blunders totally devoid of the requisites of deliberate misrepresentations". See Reding Broadcasting, Inc., supra, 69 FCC 2d at 2207. In other words, where, as here, a finding of misrepresentation hinges on whether Mr. Rice's alleged comments to Mr. Hanks or Mr. Rhea could constitute "involvement" in managerial or policy decisionmaking, no intent to deceive has been established. It is clear that the Licensees attempted, in good faith, to fully comply with §1.65 of the Rules. If they fell

short, it was unintentional and certainly not disqualifying. Therefore, Issue 2 should be decided in the Licensees' favor.

C. Mr. Rice Did Not Engage in an Unauthorized Transfer of Control

176. Issue 3 inquires whether, in the context of Paragraphs 16-17 of the Show Cause Order, Michael Rice or the Licensees have engaged in an unauthorized transfer of control if Mr. Rice truly has been excluded from all management, policy, and day-to-day operations of the Licensees' stations. Here, again, the burden of proof rests ultimately on the Bureau and, again, as demonstrated below, it has failed to meet its onus.

177. The uncontradicted record evidence establishes that pursuant to resolutions adopted by the Licensees' Boards of Directors, Janet Cox became a Vice President of each Licensee following Mr. Rice's hospitalization in April 1991. Findings ¶¶8, 10, 12. Likewise, the record is clear that in April, 1991, the CMI and CBI Boards adopted resolutions declaring that, because of the pendency of criminal charges against Mr. Rice, Vice President Cox was authorized to assume the additional responsibilities of Chief Executive Officer and to manage the CMI and CBI stations in conjunction and consultation with their respective general managers. Moreover, LBI Vice President Ken Kuenzie was to assume the same role for LBI, but he delegated to Janet Cox the responsibility of overseeing the General Manager of KBMX(FM). Findings ¶¶29-31.

178. According to a law review article concerning the law of FCC transfers of control, Stephen F. Sewell, Sales of FCC Authorizations, 43 Fed. Comm. L.J. 277, 313 (1991), the "general rule" for

changes in officers of a corporation, as stated in Storer Communications, Inc. v. FCC, 763 F.2d 436, 442 (D.C. Cir. 1985), is: "Corporate officers...may exercise substantial day-to-day working control; yet FCC approval would not be required before a corporation was allowed to replace such personnel". Mr. Sewell notes that although in WHDH, Inc., 17 FCC 2d 856, 863 (1969), the Commission found a de facto transfer of control when the president of the licensee resigned and a replacement was installed, "[t]hat case should be distinguished from the general rule expressed in the Storer case...[because in] WHDH, Inc., the Commission expressly noted that the president involved exercised powers that were 'far more significant than mere changes in officers'." 43 Fed. Comm. L.J. at 313.

179. Applying the Storer and WHDH principles here, no evidence was adduced to support a conclusion that Michael Rice or the Licensees engaged in an unauthorized transfer of control by excluding Mr. Rice from a managerial and decisionmaking role after April 1991. There simply was neither a de jure nor de facto transfer of control. All that transpired was that the Licensees' Vice President, Mrs. Cox, became the Chief Executive Officer of the corporations taking on additional responsibilities due to Mr. Rice's incapacity and consistent with the Licensees' Board of Directors' resolutions. While Mr. Rice still held an officer and director titles with the Licensees, he effectively was emasculated from exercising such functions by the Licensees.

180. Where, as here, there is uncontradicted evidence that Mrs. Cox's role in the day-to-day management of the Licensees and oversight of their stations dramatically increased from 1988 to 1991, while Mr. Rice devoted more of his time to technical matters and his other business interests (**Findings ¶28**), the anomalous WHDH, Inc. case is not apposite. No unauthorized transfer of control occurred when Mrs. Cox's existing title and duties as Vice President expanded to become Chief Executive Officer while Mr. Rice's role contracted. See Storer Communications, Inc., supra. In sum, there is no Commission precedent precluding a licensee's vice president from becoming its chief executive officer, or precluding a vice president from running a company as chief executive officer in lieu of a disabled president, such as Mr. Rice, without first obtaining prior Commission consent to do so. Indeed, that's precisely what vice presidents of corporations or the U.S. Government do. See U.S. Const. Amend. XXV (Presidential Disability).

D. Miscellaneous

181. Finally, the Bureau submitted as part of its direct case on Issue 2 three letters from Mr. Rice to two individuals responding to their inquiries as to whether CBI's construction permit for KAAM-FM, Huntsville, Missouri, was available for purchase. **Findings ¶111.** The Bureau apparently believes that Mr. Rice's letters establish that the Licensees misrepresented the extent of his involvement in the Licensees since he rejected preliminary inquiries about station sales. The letters, however, are not persuasive evidence on this point.

182. Unquestionably, Mr. Rice is the sole shareholder of CBI. The letters in question discuss a possible transaction involving a potential sale of CBI's permit, a major asset of the company. The fact that Mr. Rice responded to such inquiries is not inconsistent with the Licensees' representations that Mr. Rice remained severed from the management, policy and day-to-day decisions of the Licensees during the period in question. Merely rejecting preliminary inquiries about a possible sale of a construction permit does not by any stretch of the imagination rise to making policy or management decisions about the Licensees' operations. Indeed, to the extent the letters are probative of anything, they establish that, consistent with basic corporate principles, Mr. Rice exercised his exclusive right as sole shareholder of CBI to approve an extraordinary corporate act, i.e., the sale of a major corporate asset. In so doing, he never improperly transferred control of the Licensees as alleged in Issue 3.

**E. No Forfeiture Should be Levied
Against the Licensees**

183. Paragraph 25 of the Show Cause Order provides that no forfeiture may be levied against the Licensees in this proceeding, absent a finding that §1.65 of the Rules, §310(d) of the Act, and/or §73.3540 of the Rules has been violated (Issues 2 and 3). Since the Bureau has not met its burden of proof on these issues to demonstrate that any of those rule and statutory provisions was violated, no forfeiture can be levied against the Licensees. However, in the event that the Presiding Judge concludes that there was a technical violation of any of the rule and statutory

provisions, the Licensees urge that no substantial forfeiture would be warranted, given the Licensees' excellent previous and virtually unblemished record of compliance with the Commission's policies and rules and the lack of any intent to violate them.

IV. ULTIMATE CONCLUSION

184. The ultimate question herein is whether the evidentiary record considered as a whole, when weighed against Commission policy and case precedent, constitutional law principles, and the paramount public interest, requires the revocation of the Licensees' licenses and construction permits. Neither the record evidence nor the law supports an adverse conclusion under any of the three designated issues. Consequently, revocation of any of the Licensees' licenses or permits, or the levying of a forfeiture, is unwarranted. In sum, the Bureau has failed to prove that the Licensees lack the basic qualifications to be or remain licensees, that the Licensees have misrepresented facts to the Commission, or that Mr. Rice and/or the Licensees engaged in the unauthorized transfer of control of the Licensees. Under these circumstances, the Licensees and Mr. Rice should be fully exonerated on all the Issues raised herein.

WHEREFORE, in light of the foregoing, the Licensees respectfully urge that this proceeding should be terminated without the

revocation of any licenses or construction permits or the levying
of any forfeiture against the Licensees.

Respectfully submitted,

CONTEMPORARY MEDIA, INC.
CONTEMPORARY BROADCASTING, INC.
LAKE BROADCASTING, INC.

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Dated: September 9, 1996

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May 21, 1991

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: License Renewal Applications of Stations KGTO
and KRAV(FM), Tulsa, Oklahoma (File Nos. BR-
900201A6 and BRH-900H01C4)

Dear Ms. Searcy

This letter is written on behalf of The Kravis Company (the "Company"), licensee of radio Stations KGTO and KRAV(FM), Tulsa, Oklahoma.

By letter of the undersigned counsel dated June 6, 1990, the Company informed the Commission that George Roberts Kravis, the Company's President and sole stockholder, had been made the subject of criminal Informations filed in the District Court of Tulsa County, Oklahoma on June 3 and 4, 1990 (Case Nos. CF-90-2147 and CM-90-0863). The purpose of this letter is to report a further development relating to this matter.

On April 23, 1991, the Court placed Mr. Kravis on probation in accordance with the deferred judgment procedure of Oklahoma Statutes, Title 22, § 991c. Pursuant to a plea agreement, Mr. Kravis had previously tendered to the Court a plea of guilty to three of the four counts alleged in Case No. CF-90-2147, and the State had dismissed the remaining count in that case. The State also dismissed all counts in Case No. CM-90-0863, and that case has therefore been terminated by dismissal. The counts in Case No. CF-90-2147 as to which Mr. Kravis tendered a guilty plea are (1) violation of Okla. Stat. tit. 21, § 1021(A)(3) (exhibiting obscene material), a felony; (2) violation of Okla. Stat. tit. 21, § 1021.2 (possession of material depicting minors in lewd photographs), a felony; and (3) violation of Okla. Stat. tit. 21, § 1029 (soliciting), a misdemeanor.

Ms. Donna R. Searcy
May 21, 1991
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Pursuant to the Oklahoma deferred judgment procedure, the Court's April 23, 1991 ruling placing Mr. Kravis on probation has been made "without entering a judgment of guilt" and has deferred further proceedings in the case, including any final adjudication with respect to the counts as to which Mr. Kravis tendered a guilty plea. See Okla. Stat. tit. 22, § 991c (1990) (copy attached).

In the Court's ruling, Mr. Kravis was placed on probation for four years, during which time he will be required to comply with probationary rules and conditions, including a treatment plan. Mr. Kravis was also required to pay a \$2,000 fine, to contribute \$10,300 to the Oklahoma Victims Compensation Fund and to perform 300 hours of community service. If Mr. Kravis satisfactorily completes his probationary period, no adverse adjudication or judgment of guilt will occur and the charges against him will be expunged. A failure to satisfy the conditions of probation would lead to additional court proceedings which could then result in a judgment of guilt and sentencing.

In the Company's understanding, the Court decided to follow the deferred judgment procedure as a result of many factors which convinced the Court that deferred judgment would be appropriate to the circumstances of the case. Pursuant to the procedure, Mr. Kravis has not been convicted of any crime and, if he successfully completes his probation, no judgment of conviction will occur.

This letter is submitted simply to advise the Commission of the Court's April 23, 1991 action. Because no final adjudication or conviction has occurred as to any of the matters alleged, we do not believe any action on the Commission's part is called for at this time. See Policy Regarding Character Qualifications in Broadcast Licensing, 5 F.C.C. Rcd. 3252, 3252-53 (1990) (¶¶ 4-7 & 11); see also 47 C.F.R. § 1.65(c); Policy Regarding Character Qualifications in Broadcast Licensing, 102 F.C.C.2d 1179, 1204-05, recon. granted in part and denied in part, 1 F.C.C. Rcd. 421 (1986).

If the Commission desires any additional information with respect to this matter, kindly contact the undersigned counsel.

Very truly yours


Stanley B. Cohen

cc: David Honig, Esq.
Counsel for Oklahoma State
Branch of NAACP

3RD ITEM of Level 1 printed in FULL format.

OKLAHOMA STATUTES

TITLE 22. CRIMINAL PROCEDURE

CHAPTER 16. JUDGMENT AND EXECUTION

ELDERLY AND INCAPACITATED VICTIM'S PROTECTION PROGRAM (NEW)

22 OKL. ST. § 991c (1989)

STATUS:

Affected. See 1990 OK. ALS 2217, Section 2.

§ 991c. Deferred judgment procedure

Upon a verdict or plea of guilty or upon a plea of nolo contendere, but before a judgment of guilt, the court may, without entering a judgment of guilt and with the consent of the defendant, defer further proceedings and place the defendant on probation under the supervision of the State Department of Corrections upon the conditions of probation prescribed by the court. The court shall first consider restitution, administered in accordance with the provisions pertaining thereto, among the various conditions of probation it may prescribe. The court may also consider ordering the defendant to engage in a term of community service without compensation, according to a schedule consistent with the employment and family responsibilities of the defendant. Further, the court may order the defendant confined to the county jail for a period not to exceed ninety (90) days to be served in conjunction with probation. Further, the court may order the defendant to pay a sum into the court fund not to exceed the amount of fine authorized for the offense alleged against the defendant or authorized under Section 9 of Title 21 of the Oklahoma Statutes and an amount for reasonable attorney fee, to be paid into the court fund, if a court-appointed attorney has been provided to defendant. Upon completion of the probation term, which probation term under this procedure shall not exceed five (5) years, the defendant shall be discharged without a court judgment of guilt, and the verdict or plea of guilty or plea of nolo contendere shall be expunged from the record and said charge shall be dismissed with prejudice to any further action. Upon violation of the conditions of probation, the court may enter a judgment of guilt and proceed as provided in Section 991a of this title. Further, if the probation is for a felony offense, and the defendant violates the conditions of probation by committing another felony offense, the defendant shall not be allowed bail pending appeal. The deferred judgment procedure described in this section shall only apply to defendants not having been previously convicted of a felony.

ATTACHMENT B